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Judiciary Committee
February 05, 2009

[LB46 LB47 LB118 LB170 LB352 LB353]

The committee on Judiciary met at 1:30 p.m. on Thursday, February 5, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB170, LB46, LB47, LB118, LB352, and LB353. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; and Kent Rogert. Senators absent: Amanda McGill.

SENATOR ASHFORD: Welcome to the committee, to the Ernie Chambers Judiciary Hearing Room, my canned introduction. Senator Wightman has LB170, LB46, LB47, and LB118 which he has chosen. They all seem to have a similar sort of tone. The killing fields, they're going to call us. (Laughter) Don't laugh, Bill. Anyway, welcome, Senator Wightman. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Thank you. Senator Ashford, members of the Judiciary Committee, I appear today and I want to thank Senator Ashford for allowing me to present all bills. As a matter of fact, I guess it was his suggestion that I present all four at the same time. They all do involve probate issues, and I will discuss them very briefly separately. And I'll do whatever you want. I'll answer questions, if you prefer, about each of the bills separately or you can wait until I finish my presentation on all four. I know the clerk is and legal counsel are probably going to love this, (laughter) but I do think it will speed things up a lot because most of the testifiers will probably testify on at least three of the bills separately or if you allow them, which I assume you will do if we're combining them, address them all at the same time. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: That would be fine. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: So I do think it will speed your day up, and you can get out into that fine weather. I'll take up LB170 first because I think that was the order that the Chair had listed them in. I am, for the record, John Wightman, representing the 36th District. LB170, which probably has raised more questions than any of the other three bills, would amend Section 30-2630.01 to give the court--and this would be the county or probate court--discretion to grant a temporary conservatorship for a period of at least 90 days or for a longer period by order of the court. Currently, Section 30-2630.01 provides that a temporary conservatorship shall be one effective for a 90-day period, and for good cause shown the court may expand the temporary conservatorship for successive 90-day periods. In practice, that fixed 90-day period is unworkable. Judges need the discretion to set the duration of temporary conservatorships to fit the needs of the clients and the courts. The hearing calendar of the courts do not allow cases to be heard or completed in the fixed 90-day period. And I might say that in some of these counties a judge traveling to that county may be only once a month, and so the dates may not fit the judge's schedule. LB170 would allow the flexibility and time needed to

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effectively administer temporary conservatorship. This proposed legislation was requested by the probate section of the Nebraska State Bar Association. I urge you to vote to advance LB170 and advance it to General File. Again, at the discretion of the committee, I would go on and discuss all of them and let you come back to questions with regard to individual bills if you would want to do it that way. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Let's just go on, John. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Okay. Number two of the bills is LB46. I won't repeat my name each time because I'm the same John Wightman as I was when I started, (laughter) bad as that may be. LB46 clarifies that actions taken and expenses incurred in discharge of the statutory duties of a personal representative are properly considered costs and expenses of administration of the estate. Specifically, costs and expenses of administration include: (1) expenses incurred in taking possession or control of estate asset and the management protection and preservation of estate assets; expenses related to the sale of estate assets; and expenses in the day-to-day operation and continuation of business interests for the benefit of the estate or would under this bill. The question of role is under a case called J.R. Simplot, and I don't remember the name of the estate, in which a court held that because J.R. Simplot who was providing fertilizer and input cost for ag commodities had to have filed, even though this was an ongoing administration, had to have filed a claim in the estate, unbeknownst to J.R. Simplot. They didn't realize that was the case, and their case was barred because they did not file it. This is to simplify the situation and clarify the situation that that is part of the ongoing administration of the estate, not debts that were incurred prior to the date of death or deaths involved in the estate. And so a claim would not be necessary. This is an important clarification because such costs and expenses of an estate administration are paid first also in the event that assets of the estate are insufficient to pay all claims of the estate in full. The language of LB46 is consistent with the language found in LB120, which I earlier...well, that's one of the...a bill that had to do with inheritance tax and has already come before the floor and is ready for Final Reading. But LB120 amended the inheritance tax law to clarify the definition of administrative costs that are a deduction from the value of the estate subject to Nebraska inheritance tax. And it said...this is in the J.R. Simplot v. Jelinik is the name of that case, was a 2008 Nebraska case, which left questions unanswered as to what are estate expenses and what creditors would be barred if they did not file claims in the estate. It further harmonizes procedures in county and probate courts across the state where different county attorneys and different judges handle the expenses differently from the standpoint of allowance of such costs as administrative expenses and how they are accrued as deductible in determining county inheritance tax. So, again, I urge your support for LB46. I'll go onto LB47. I might add that this was also brought at the request of the Nebraska State Bar Association. LB47, and I'm kind of out on my own with regard to LB47 in that this was not done at the request of the bar association. It's a good bill.

[LB170 LB46 LB47 LB118]

SENATOR ASHFORD: That's better. (Laughter) [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: (Exhibit 1) LB47 would amend Section 30-2302 of the Nebraska Revised Statutes governing the distribution of property of someone who die without a will. A person who has a will, this isn't going to affect it at all. Section 30-2302 provides for the succession interest of the surviving spouse and determines how much of the decedent's property is distributed to his/her surviving spouse. Sections 2 and 3 provide for a fixed dollar lump sum payment to the surviving spouse before the estate is divided as applicable between the surviving spouse, if there are no children or to the surviving children of the decedent. This fixed dollar lump sum has not been adjusted for inflation since 1980. And the whole idea of these bills that provide for succession interest is to try to determine on average what the normal person would do if they'd had a will, and because of one reason or other they haven't made a will. And so the law is trying to put them in somewhat the same position as they would have been in. The current lump sum amount is the first \$50,000 in Sections 2 and 3 of 30-2302 of the Nebraska Revised Statutes. LB47 would increase the fixed lump sum payment to the surviving spouse for the first \$100,000 of the estate, and then a balance would be divided half and half. It would not change...we wouldn't seek to change Section 1 of 30-2302 which provides what happens in the event there is neither parents or there were no children. Let me find the section number here. The first section says the value of...they would receive the value of all of the...I thought I had the sections in here. Excuse me for a minute. Okay. Subsection (1) now reads if there is no surviving issue or parent of the decedent, they get the entire intestate estate. They get that under current law. We're not asking that that be changed. It would stay the same. Subsection (2) of this section as it now reads, if there is no surviving issue but the decedent is survived by a parent or parents, it would change that from the first \$50,000 to the first \$100,000 plus one-half of the balance of the intestate estate. Subsection (3) we would also change. If there are surviving issue, all of whom are issue of the surviving spouse also, the first \$100,000 plus one-half of the balance of the intestate estate. Subsection (4) we're not seeking to change. If there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate. This one is for kind of a special case because it usually would always involve a second marriage, but wouldn't necessarily because the spouse could have children and it could still be a first marriage for the decedent. But that always becomes an issue and it's something that should be covered probably by a premarital or postmarital agreement. Maybe all of you here are familiar with that, that's an agreement entered into that limits the share of the surviving spouse if that death occurs during their marriage. And so we aren't seeking to change that because it is a pretty sensitive subject, and usually would be the subject of a premarital agreement in which the spouses before they ever marry enter into this agreement, and they can enter into it afterwards. At one time during my practice, which spans a half a century now, you couldn't have a postmarital agreement. But more

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recently, maybe 35, 40 years ago they finally did allow for postmarital agreements and they recognized that spouses could have different interests and they weren't one in all situations. So two of the sections we'd leave untouched. Two of the sections we would increase the limit to \$100,000. The \$50,000 lump sum was set, I think, in 1980 and I always look at the inflation factor in situations such as this. And the CPI indicates that if you took the 1980 figure and moved it forward to 2009, that that would amount to \$121,888.62. So we're not quite, even with \$100,000, keeping pace with inflation. We feel that the increase in the fixed payment is needed to help provide the surviving spouse with the funds necessary for their continued support. Generally, the spouse would desire that their surviving spouse have the resources necessary for their support and that the children can wait for their inheritance until after the death of the surviving spouse. I have seen it in my practice, not often recently I guess, where two young people are married. They maybe have acquired a home, maybe they have \$200,000. Even under this bill, if they didn't have a will, if the decedent spouse didn't have a will, the children are going to inherit \$100,000 of that money if there's a \$200,000 estate. And mine doesn't change that. They're still going to inherit \$100,000, but they're going to get \$100,000 instead of the \$50,000 that they would get under the current law. So it's my position that the surviving spouse should not be placed in a position that he/she has to resort to Medicaid or other state or county assistance programs for their continued living and medical costs. I think it's furthermore in keeping with what most people would do if they had had a will. So I suggest that after 29 years, I think we need to bring things like this current with regard to inflation rates, that we need to adjust that figure. I've said the proposed legislation wouldn't increase paragraph 4 or subsection (4), which I consider to be the most sensitive of the areas because it's a second marriage and that can always create a lot of conflict. As I say, most of those would be covered, a lot of them would be covered by prenuptial or postnuptial agreement, probably far more of them should be. But I think it is time to amend that now. We have...I don't know whether...I'll have my...Roger Kettle...pass out what other states have done in this regard. Some of them have it all going to the surviving spouse in the instance of subsections (2) and subsections (3); very few do with regard to subsection (4), which is the second marriage situation or one where there are children by a previous marriage of the surviving spouse. So I'll pass that out for what it's worth, and you'll have an opportunity to see what other states are doing. With that, I'll go to LB118. LB118 amends the statutes to provide for the succession of personal property by affidavit for estates with personal property not exceeding \$50,000, and succession to real property by affidavit for estates with real property not exceeding \$30,000. Again, this was a bar association bill, but I had a bill that I was going to introduce irrespective of the bar association's provision. Mine would only have increased the rate...let me tell you a little about what the bill does and what the current law says. In order not to have to go into probate court and spend all of the six months that it might take to carry estate through completion in a probate court, we passed a number of years ago, a law that...and it might have been \$10,000 initially, but that said that if you had an estate under a certain amount and it's currently \$25,000 of personal property that you did not have to go

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through probate, that you could pass that property by merely signing an affidavit, obviously the decedent could not, but his children or issue could or whoever would have received the property. And a bank, an insurance company, anybody else would have to honor that affidavit and they were then free to pass the property to whoever it said in the affidavit would have received the property had there been a probate or administration of the estate. My bill first was going to just increase that to \$50,000. At some later date, and I may have the date, but then it would show up in the legislative statute, the Legislature passed a law that said you could pass real estate up to \$25,000 in the same manner. You had to show the...you had to reflect on your affidavit that's going to be filed with the register of deeds showing what the tax valuation. And they do use tax valuation to determine what the valuation is, which may be less or more than what the actual sale price would be. But you just have to base it upon what the tax valuation in the county assessor's office is. Mine was not going to change that. Theirs was going to set both of them, the bar association is at \$50,000. I really thought \$50,000 was a little high because there are some times where \$50,000 will cover almost all the real estate in some of these small towns. I used to live in one of them, I know. Lexington can get a little higher than that, but some of them do not. So really again it's somewhat to keep pace with inflation. The bar association will address these issues also, a representative. And we probably aren't keeping up with inflation even with these, but I think they're more realistic figures. The \$30,000...the reason I had suggested a lower value on real estate is real estate is a little more complicated manner than personal property. And I suppose a case could be made at setting that at \$50,000 as well, but an awful lot of houses in outstate Nebraska are valued at less than \$50,000, particularly in small towns. I know for you folks in Omaha and Lincoln, that may be difficult to imagine. I think Senator Christensen can easily. He would have many towns in his district, and Senator Rogert might, where there are a lot of houses under \$50,000. So I just thought \$50,000 was a little high on that. So with that, I would be glad to try to answer any questions of all these. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Well, you can go onto LB352 if you want. No, I'm kidding, John. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: And that's yours? (Laughter) [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: I mean, you're doing pretty well. Do you have any questions? Senator Lathrop. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: I do, if I can. I've looked at the other bills and they all seem to make sense. And I only dabble as I'm forced to in probate matters, but I do a little bit of conservatorships in connection with representing minors. And so LB170 is a subject matter that I have a little more familiarity with, Senator. And I do have some questions. It looks to me like what we're doing is instead of saying that we can enter an order for a temporary conservatorship for 30 days at a time, it's going to be 90 days or longer as

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the court deems it advisable. Here's the thought that I have: If it's a temporary...the idea behind a temporary guardianship is to do something before we set up a permanent conservatorship. And so why do we need to extend them beyond? What's the circumstance that would compel us to extend the conservatorship beyond, say, a 90-day period? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Well, sometimes I think it's even difficult to marshal all the information and be able maybe to get a permanent guardianship established. Probably not so much in Omaha and Lincoln as it would be outstate because maybe the court is only there on given days, and they may not be there within 30 days. I think members of the bar association may be better able to answer why that might be necessary in Lincoln and Omaha, but I can see it outstate particularly. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Was this your idea or did this come to you through the bar... [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Oh, this came directly from the bar association. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Okay. Then I'll save those questions for Mr. Mueller. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: The one that was my idea was increasing the succession interest of a surviving spouse. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: That's an interesting bill. And just so the record is straight on that, that's LB47 that you brought with the changes in what the spouse gets--if I'm married, die, and don't have a will. Right? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Right. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: That certainly seems to be appropriate. I'm like you, if I was writing it from scratch and somebody died intestate with a spouse and no children, I'd probably give it all to the spouse and none of it to the parents, but. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: And I think it's even more of a problem when there are minor children involved because all of sudden here we have to take half of the estate or at least half of the estate, except the first \$50,000, and set that aside to the children when the children really aren't in a position to use it if they're minors. And may leave the spouse without any method of support or at least a very limited method of support. So I think it's even more dramatic on what the effect of that can be where there are minor children. [LB170 LB46 LB47 LB118]

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SENATOR LATHROP: Right, right. And then on LB118, which is the handling small estates by affidavit, that actually is something that helps families not have to hire a lawyer to handle matters that are relatively small in nature. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Right. I go into that with mixed feelings. (Laugh) [LB170 LB46 LB47 LB118]

SENATOR LATHROP: I know you do. (Laughter) Me, it's like a void in a small claims court claim, so I'm okay with it. But thanks, Senator. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: But if I have a conflict of interest, I'm not introducing it in line with my conflict. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Apparently, apparently, John. Thanks. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Thank you, John. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Thank you. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Proponents of any of the four bills that we have before us? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Okay. Good afternoon, Senator Ashford and members of the committee. My name is Susan Spahn, S-p-a-h-n. I am a private practice attorney in Omaha, Nebraska, with the law firm Fitzgerald Schorr Barmettler&Brennan. And I have had the luxury and the good fortune of exclusively focusing my practice in the estate planning, and more so in the after death estate and trust administration areas of law. Many of the bills...I'm going to talk about three of the bills on behalf of the NSBA, and that's why I'm here today is testifying on behalf of the NSBA. And we do want to thank Senator Wightman for bringing these bills, presenting them to you, because he did do these three bills that I'm going to talk about on our behalf. I am, however, going to address them in reverse order, saving the best for last or at least the one that's going to generate the most questions for last. So the first one I'll start with is LB118, collection of personal property by affidavit. We support this, not only for the smallest state situation, but a lot of times in 80 percent of estate plans they're what I call "honey, I love you estates" with everything to my surviving spouse, if I'm not survived my spouse, to my children in equal shares. In that situation they may think that they have everything in joint tenancy or designating their spouses as a beneficiary, but they may forget about an asset. This allows for their intent to be carried out where the spouse is going to receive everything or at least up to \$100,000. And then ultimately hopefully to be transferred down to the children when the surviving spouse dies. Not only is it a relevant bill for

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small estates, it's also relevant in estate planning when a client chooses to title most of their assets in their revocable living trust, because a lot of times clients like to keep their cars outside of the trust in their own name individually. And they like to keep their personal checking account in their own name individually. And it used to be that \$25,000 was sufficient to have whatever their checking account balance and their vehicle would be under \$25,000, and we could transfer those assets to the intended recipients without probate, no problem. But anymore cars are a little bit more valuable, people have a little bit more cushion in their checking account, and we're finding that people are combining those amounts for more than \$25,000. And that's really the person who initiated the interest in this bill is more in the estate planning world wanting to make sure that we can complete the estate plan without probate, which was the intent of the work that was performed. LB46 is the bill that was generated due to the Simplot decision, as Senator Wightman discussed. In that case, the Supreme Court noticed or they drew attention to the fact that our statutes really don't have a good definition of what constitute estate administration expenses, whether an expense of an estate is an administration expense has two relevant factors: (1) the creditor does not need to file a claim in the probate estate if it's an administration expense; and then (2) under the abatement statute, administration expenses have priority over other types of expenses of the estate. The bar association came up with this definition of estate administration expenses looking at the federal law as it allows deductible expenses and what seems reasonable. This distinction that we've made is that the expenses that a personal representative incurs in protecting and preserving the estate property during that necessary administration time, in our opinion those should be deemed an administration cost and not require creditors to file probate claims in the estate. Also just so you're aware, there is a similar bill presented in the Revenue Committee that we had a hearing on that a couple of weeks ago where it uses the same definition of estate administration expenses so that their deductible on the inheritance tax worksheet has a valid deduction. So there is some continuity here in between the bills that we've presented. And that's LB46. The last bill that I'm here to testify on behalf of the NSBA is LB170. And I realize this one has created some controversy in the last 24 hours. Our list serve has been a little busy. I would like to let you know the process that we went through in asking this bill to be presented. I've been active in the real estate, probate, and trust section of the bar for 20 years. I typically go to the meetings and I'm active. And we are starting to meet in the summers, not just during bar week but now we meet in the summers to talk about, do we see any changes that need to be made in the legislation and the law to help our world function more efficiently and fairly. And this issue has come up in my practice. I've had several contested guardianship conservatorship cases where you get a temporary appointment first. And then you have to continue until you get a contested hearing. We just wrapped up a hearing that took 12 months, from the temporary appointment to trial was almost 12 months, just shy, eight days shy, of being 12 full months. When you're preparing for a contested trial on a conservatorship or guardianship, you have to subpoena medical records which takes 45 days to two months to obtain those records. You have to get doctor's evaluations to get

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someone a psychiatric evaluation. To go to UNMC can take six weeks to make that appointment, six-plus weeks to make that appointment. To get them to submit the report takes another month. It takes time. Sometimes if someone has been doing off put stuffs--I'll just say the word stuff--with the finances, sometimes it takes months to figure out what's been going on with the money, getting the paper trail put together. It takes time to get that done, and you can't get it in 90 days. Our trial started in October, we had two days the first part of October, two days the end part of October, finished up in December. And now in that case, my client was temporary conservator and I tried to go in and get the judge to say every 90 days renew the appointment, I think one of my orders is still on his desk. You know, and now what authority does my client have as temporary conservator? It leaves me uncomfortable with the situation as it exists currently. The interest that's come up, and I don't know if there is anybody here to speak against this bill, the interest, the case that's been cited on the list serve is the Everett D. Larson case. That was a contested guardianship and conservatorship case that is out of Douglas County and of which I am intimately aware because I was one of attorneys on that case, and we represented the temporary conservator and the ward's daughter. During that case, there was an appeal pretty early on and we proceeded back to trial. The trial lasted 39 days over six months. In the end, the Douglas County court determined that the attorneys representing the ward were not acting on his behalf interest, and they awarded them zero of the \$300,000 in fees those attorneys were requesting. There's a lot going on in this case that cannot be presented here. This isn't the appropriate forum for that case to be debated. The one thing I would point out is, if LB170 would have been in effect when the Everett Larson matter was pending, it would not have effected the outcome of that case at all. It would have made no difference on the Everett Larson trial. So as you get your phone calls and you get e-mails about this, think about that point. All we're doing is giving a Douglas County court, any county court, Lancaster County court, any county court judge the authority to say, I'll appoint a temporary appointment for 90 days or until we have the evidentiary hearing or within six months. Give the judge the flexibility they need so that they can make the appointment they need, because it is hard to get in there every three months to renew the appointment with and to show good cause. Also, if you do have good cause and you have to go in there every three months, all you're doing is just increasing the litigation fees and the cost to ultimately most likely the estate of the ward. It probably takes four to six hours to prepare a motion and order, go in there, schedule a hearing, attend a hearing, and prove up every three months. So why put an estate to that expense, especially when LB170 does not change the right of the ward or an interested person to request an expedited hearing on the issue of competency? That's not changed at all. So at any time, the ward or anyone interested on his behalf can request the expedited hearing and the court is required to have that hearing. I think my light went off. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: It did. [LB170 LB46 LB47 LB118]

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SUSAN SPAHN: I'm sorry. I could talk all day on this. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Yes, Senator. [LB170 LB46 LB47 LB118]

SENATOR COASH: Thank you, Chairman. Thank you, Susan. I do want to talk to you about LB170. Is it conceivable that if this bill were passed that a court could extend guardianship indefinitely for someone? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: It could indefinitely unless someone comes in and says, Judge, we want a hearing on the merits and let's hold an expedited hearing. [LB170 LB46 LB47 LB118]

SENATOR COASH: But so somebody could indefinitely be out there? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Theoretically . [LB170 LB46 LB47 LB118]

SENATOR COASH: Okay. Can't temporary guardianship already be extended, as you put out, in an emergency case if people need more time? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: You can, and you file a motion, schedule a hearing, show up, get an order, and show your good cause. You can do that. It's hard when you're preparing a case. It is taking additional time and effort and cost to the lawsuit to go in there every three months to go through the same hoops all the time until you have your trial. [LB170 LB46 LB47 LB118]

SENATOR COASH: Okay. Do you think this interferes with any due process for the person who's going to have their guardianship put in limbo for 90 days, another 90 days or potentially indefinitely? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Not when he can request an expedite hearing and that hearing has to be held within ten business days. His due process rights are being met. I am more concerned about the time period in which trials could be held. It'd be great if we could speed them up and not take a year to get through a complete trial, but that's beyond what we can fix today. What we can fix today is to allow judges the flexibility to enter an order. If you want to limit a temporary to two years, you know, that would be fine with me. But to have to go in every 90 days and prove up while you're preparing for a trial and everybody is being represented, it doesn't seem to make sense to incur that additional cost, because ultimately, you know, it typically will get paid out of the ward's estate. [LB170 LB46 LB47 LB118]

SENATOR COASH: Okay. Thank you. [LB170 LB46 LB47 LB118]

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SENATOR ASHFORD: Yes, Senator Lathrop. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Ms. Spahn, for those not familiar with the process, the uniform probate code, Nebraska's probate code dealing with conservatorships in Chapter 30, it provides a process for establishing conservatorships, and then it has this section, 48-2630.01, that deals with emergency situations. Is that right? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: It has. Yes, that's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And basically when we're talking about a conservatorship, we're talking about--just as a matter of background--we have somebody that's incompetent or someone who is a minor. Is that right? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: So we could be talking about somebody who's developed dementia, which is where people are fighting over the right to represent or be the conservator for a parent, typically, or an aunt or uncle or somebody or we can have a brain injury for somebody who is a competent adult who has an acquired loss of their competency, and then we have minor children. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And the law has a...and the probate code sets up a process for us to go through if we want to set up a conservatorship, and we have a hierarchy for that process. The probate code says this person has first shot at it, this person has second shot, this person is third in line. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Do you agree so far? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Um-hum. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Okay. And what we're amending is what happens if we have an emergency situation. That's this statute. And it starts out by saying you can get an ex parte order, and that's a lawyer term, means you can go in without a hearing, without the other side having the right to say what their side of the story is, you can go in front of the county court judge, tell them why you think there's an emergency, tell the county court what the circumstances are. And the court can actually say, you are now the temporary conservator in this emergency situation. [LB170 LB46 LB47 LB118]

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SUSAN SPAHN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And by the way, the conservatorship is different than a guardianship. The guardianship deals with making medical decisions, deciding where somebody is going to go to school, what hospital they're going to go in, whether they're getting brain surgery or not. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Conservatorship is just about the money. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: It's the estate. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Yeah. And I say "just" because the big stuff is over here with the healthcare and that's in guardianships, and this is just about the money. So we're usually arguing about who's going to represent the incompetent person as it relates to their funds and their money. Right? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: That's right. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And so this emergency will typically come up when somebody has discovered that mom or dad or aunt or uncle or grandpa has dementia, Alzheimers. I mean, that's a typical situation. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And there's fear that they're being exploited and their money is being wasted. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Okay. Fair enough. And that's one of the...sometimes people are allowed powers of attorney and they do bad things with them and they waste money and a son or daughter will come in and say, I need to fix the situation. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And stop it. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Stop it. That would be an emergency. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Yes. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: But the whole idea behind getting in an ex parte order and having an emergency is that it's just to take care of the exigent circumstances and not to allow it to go on indefinitely. And the problem I have...and I'll just tell you I do have a

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problem with the way the bill is written, the problem that I have is...and you talk about sorting out, following the paper trail. You know, if the son had the power of attorney and we know he was gambling and wasting assets, and the daughter comes in and says, I want to be appointed. The idea that it takes time to sort out what the son did is a reason to have a full-blown conservatorship and not exercise your powers under the emergency provision of a conservatorship. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Okay. Yes. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: You agree with me? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Um-hum. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And I appreciate that it takes a long time to figure out what the person did who had control over mom or dad's assets before the conservator gets involved, but that shouldn't change how long we let an emergency...somebody serve in an emergency capacity. And you were involved in these big long fights. I would say that's very much the exception when it comes to conservatorships. And the idea if we change this statute is we could be handling personal injury claims for minors under an emergency order that has an indefinite period of time instead of requiring people to go through conservatorships. Couldn't we? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And that would be...but even... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: That might be in some people's idea, in some people's view that could be an emergency and they come in to the judge and say, we have an emergency. Mom and dad are divorced, dad is here in front of you. He wants to be the guy representing junior in the claim against, you know, somebody's insurance company. And that really isn't what this stuff is designed for. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: But then dad...if dad is appointed as temporary conservator, he's going to need to provide notice of those pleadings to his wife or ex-wife or the mother, and then the mother is going to have the opportunity to object or contest and seek appointment herself. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Except that we're sort of giving them a jump on the mom in this situation, and that's the problem I maybe have...the situation that I have a little bit of trouble with is you now have the temporary order, and all you have to do is come back each time and go: We haven't sorted it out yet, judge, and we're still in the process of making a claim or we're still in the process of trying to dig out and figure out where the assets are. And we never get around to having a hearing over who should be the conservator for months and months and months. And this section, as I read it, allows for an ex parte order. It calls for a hearing within ten days, which is pretty quick by

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standards of having hearings, things that you and I deal with all the time. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Um-hum. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: It just seem to be an emergency provision and we're now turning it into a long-term conservatorship. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: When you have someone with dementia, the emergency exists because...and let's say you have the power of attorney and someone is acting under that power of attorney and they're stealing. They're taking the money. They're paying off tens of thousands of their own personal credit card debt. They're socking the money away somewhere else. Who knows what they're doing with the money, but there's a vast depletion in their assets. The... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: A horrible situation and a real concern, right? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Happens all the time. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Right. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: You get the temporary appointment and stop the madness and stop that person from exerting the authority under that power of attorney. And then the temporary conservator can marshal the assets and protect them until the trial. When you have... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: But we don't need a trial on whether or not they had a right to do those things or should have or whether it was ill-advised. What we need is a trial on who ought to be the person that's the conservator. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Exactly. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: And that person can continue on the quest for all of the misdeeds of the person with the power of attorney. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: You have two things that you have to prove: (1) does the person need someone to manage his property on his behalf? Does he suffer from such incompetency that he cannot manage his property and finances, and they're vulnerable to waste? That's the one hurdle you have to meet. Then the next hurdle is, who is it best served the ward? Who's going to fill the shoes and be conservator for the ward? Those are the two components of any contested trial. The judge won't separate those two. [LB170 LB46 LB47 LB118]

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SENATOR LATHROP: I don't disagree with you. I agree completely. You go get a family physician who looks at it, him or her, and by the way, you can have an independent doctor come in, but you get the family doctor and he writes a note that says, grandma has dementia. It said some particular state she's not competent to handle or manage her own financial affairs, and a conservator is necessary, a one-page letter and you've got the first hurdle, right? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Um-hum. Well, you have the first hurdle subject to challenge, because let's say grandma says there's nothing wrong with me. I want a neuropsychic evaluation. Grandma can get a neuropsychic evaluation, get back a clean enough bill of health, and go in and ask for the expedited hearing to have it removed. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Let's talk about that first hurdle then. Should grandma have a temporary conservatorship that goes on for two years if she doesn't want it? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: No, because...but she's not stopped from stopping it. She can get her own neuropsychic, her own evaluation, and ask for it to be... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: But it just seems to me that that whole process shouldn't go on longer than three months. I think three months is generous if grandma is saying, there's not a thing wrong with me. It's usually not what the fight is about, is it? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: The fight is usually about someone... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: The fight is usually...everybody usually agrees that grandma is no longer competent. The fight is usually over who gets to run the show. Isn't that usually the case? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: I have not had a case where everybody agreed on incompetency because no one is willing to succeed that point. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: It might be a leverage in the fight over who gets to run the show, and who gets to run the show in turn might decide which lawyer represents the estate and who gets to be close to grandma at the nursing home. Even if we're...we don't have to really be totally cynical about this, but that's kind of how it breaks out, isn't it? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: No, because visitation rights would be the guardian's choice. It's more...you may have the emergency situation, but until you can have the trial you still

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need someone to manage the assets of the estate, to file income tax returns, to make sure the bills are paid. If you don't have the temporary appointment until the trial, then you're in a limbo as to who's going to take care of the estate until you can have the final trial. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Yeah. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And so the emergency continues everyday because the adult can't do it. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Yeah. I will just tell you that from my own judgment, this would be very much the exceptional circumstance where you're going to fight over this stuff for 39 months or whatever you said it went or 39 days of trial over a year. I think that's so exceptional that I would be reluctant to change the policy that says all this stuff needs to be done in 90 days, because the other side of it is if we said 180 days, then that just affects how the county court is going to schedule it. And now everybody is in limbo or everybody is fighting for six months instead of three. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: The last one I represented the temporary conservator, we were ready for trial within five, six months. We were ready to go. We didn't get in trial that quickly because of the court's calendar. And... [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Right. So you would have had to have extended it. You would have gotten your 90 days and you would have had another extension. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: No, I would still have to extend it right now because we still don't have an order. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Well, that part we don't have control over. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Right. But that's what we're faced with in the trenches. That's the reality of the situation, and that's what we're trying to at least alleviate a little bit of the concern here with giving the courts some flexibility as to how it enters orders. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: You told us this rose out of an Everett Larson case from Douglas County. That was one that you were involved in. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: I'm telling you that the opponent, the recent interest opposing this bill is being brought...the Larson case is being used as a reason why this bill should be opposed. [LB170 LB46 LB47 LB118]

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SENATOR LATHROP: Okay. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And I was involved in that case, and all I think is relevant here is if LB170 would have been in effect during the Larson trial, it would not have affected the Larson trial at all. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: Well, I don't know anything about the Larson trial. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Yeah. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: I wasn't involved in it, haven't heard from anybody that was, as far as I know. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: And you're very fortunate. [LB170 LB46 LB47 LB118]

SENATOR LATHROP: This is just my own experience because I do get into conservatorships as I need to to do work for minors, and it just seems to me that 90 days should be enough time to resolve things on a temporary emergent basis. I'm just one guy on the Judiciary Committee. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Thanks, Senator Lathrop. Yeah, that's very interesting. No? [LB170 LB46 LB47 LB118]

SENATOR LAUTENBAUGH: No. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: No questions or no "no?" (Laughter) Senator Council. [LB170 LB46 LB47 LB118]

SENATOR COUNCIL: Thank you, Chairman Ashford. Good afternoon, Ms. Spahn. Senator Lathrop touched on a couple of concerns I have about extending it, and that is because it is an ex parte order. The judge is making the determination solely upon the allegations of the person seeking the temporary conservatorship, and the intent of the statute originally was designed to address the emergency. And when we're in a situation where...I guess if we're going to relate personal experiences, I've been involved in cases where a temporary conservator was appointed, a request for an expedited hearing was made and never held. So in terms of the opportunity to address the issue that is at the core of this statute is whether there are exigent circumstances of such a magnitude as to warrant a temporary conservatorship until you can address the permanent issue, I mean, it's gone both ways. So the worst-case scenario you have presented has occurred, but also the worst-case scenario from someone who is trying to get past these ex parte temporary conservator orders, it works equally to their

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disadvantage. Would you not agree? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: All I can say on that is if the judge is not complying with the statute, then I think you file a JKC complaint against him and seek he be removed and ask him to recuse himself if he won't comply with the statute. [LB170 LB46 LB47 LB118]

SENATOR COUNCIL: Yeah. That is a response to seek out a complaint against the judge in that case. I don't know how many of my colleagues would be interested in going that route as opposed to every 90 days being required to show that the emergency continues to exist. I have problems with, "or for a longer period designated by order of the court" because the court then is acting solely upon the position of one party, that X party basis, no opportunity to be heard as to whether whatever the longer period that may be requested in that situation is appropriate. I do understand, and I don't know whether my colleagues understand, that there are serious scheduling issues in certain of our county courts in terms of getting these matters tried. But I don't think that that warrants continuation of the temporary conservatorship beyond 90 days. I think there has to be a point in time where the exigent circumstances that gave rise to the temporary order need to be addressed. And I think 90 days is enough, and I don't know whether the letter from the ARC is referring to the Larson case or not. It doesn't mention it. But ARC opposes it, too, with regard...and some of perspective of the ward, so. That's all I have. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Yes, Senator Coash. [LB170 LB46 LB47 LB118]

SENATOR COASH: Thank you, again, Senator Ashford. I'm not an attorney, so I appreciate you being here, Ms. Spahn, to help me work through these legal issues. I just thought of a situation. I don't know if you could help me understand a little bit. Let's say a son gets a temporary conservatorship over his dad because he...brain injury or dementia or something like that, and dad says, no, I'm fine. Okay. But the son has the temporary...it's been granted, the temporary conservatorship has been granted. And the dad says, no, I'm fine and wants to go and hire an attorney to represent him, but the son says, nope, I've got your money. You don't now have the resources to go hire your own attorney. Is that conceivable that that kind of a situation could happen that the guardian or the conservator could control the resources of that person to such an extent that they wouldn't have the resources to be able to defend themselves and go through the due process? [LB170 LB46 LB47 LB118]

SUSAN SPAHN: The court will appoint...the ward has the ability to hire an attorney himself, and then the court can actually appoint an attorney for the statute on behalf of the ward. And then the expenses would be paid out of the estate as the court deems reasonable. One of the problems I have is people can have...you can carry on a conversation with somebody about the weather. My mom is in a nursing home because of dementia, I can chat with her about the weather. People don't understand why she's

there. She can't take care of herself. She has no executive functioning, that she can take X, Y, and Z and connect the dots to this is what I need to do. It's gone. But if you chat with her, you think she's okay. Now, if you have someone that even starts exhibiting symptoms and hires an attorney, how far are those attorneys going to go to defend that ward? \$300,000? Is that reasonable to fight and accrue fees of \$300,000 to try to challenge a guardianship and conservatorship for this person who has been diagnosed by his treating physicians, his past two treating physicians? It may be three psychologists that he can't manage his finances on his own. Who is actually steering the ship in that situation? Is it the ward or is it the ward's attorneys? And whose interest are the ward's attorneys representing? You have room for manipulation. If you give the attorneys representing the ward carte blanche to spend however much money they want in their representation of the ward, that's the real problem here. And that's where I think our ethical rules need to be examined, and our guardianship and conservatorship laws need to be examined when you're representing a person with dementia. Who is steering the litigation and should the attorneys have carte blanche to spend hundreds of thousands of dollars defending or maintaining that litigation? [LB170 LB46 LB47 LB118]

SENATOR COASH: Sure. Well, I use the example of dementia since it's been thrown around. But one of my concerns is for people with disability, and my experience has been that people with disability are frequently perfectly capable of representing themselves and advocating on behalf of themselves. Yet a conservator or guardian will use this as a way to exert control for a longer period of time than I believe is necessary, so thank you. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Thank you. [LB170 LB46 LB47 LB118]

SUSAN SPAHN: Thank you. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Any other testifiers on these bills collectively? John, can I ask you a question? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Sure. I'll come back up. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Maybe no one else is going to testify on this, so. On the scheduling issue in probate matters, is it...this is going to sound very simple, but are we...these cases are tried in the probate court. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Right. Or in the county court. The county court is the probate court. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Right. Is that a constitutional requirement or is that a statutory requirement that the probate court try these cases that Ms. Spahn has described?

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[LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Well, all guardianships and conservatorships are tried in the county court in the same court... [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Right, sitting as the probate court. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Yes. It's much broader than the probate court out in outstate Nebraska. Here they may have divisions in Lincoln and Omaha that... [LB170 LB46 LB47 LB118]

SENATOR COUNCIL: Used to. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Right. We used to. We sure did used to. Is there a constitutional infirmity to expanding the jurisdiction of the district court to try these cases? Do you know of any? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Well, I think it would take legislation to do that because I think right now, I think the county court has exclusive jurisdiction of probate matter... [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: I think they do, but...I asked Scott. I just can't remember. I don't think there's a constitutional prohibition, it's statutory, isn't it? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: I'd have to look at that. I know recently, not to...when I talk about recently we may be talking about the last 20 or 30 years as opposed to (laughter) one or two years. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Well, I was remembering back to 1987 yesterday. Yeah. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: But not so long ago by my standards, Chairman Ashford. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Yes. It's all relative, Senator Wightman. I mean... [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: We actually had a change on the appeal method. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Right. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: And you go directly to the court of appeals... [LB170 LB46

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LB47 LB118]

SENATOR ASHFORD: Court of appeals. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: ...from the probate court today on probate matters... [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Instead of the district court. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: ...and it used to go through an intermediary proceeding in the district court. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: And is that the way it is...it's directly to the court of appeals now. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: That's correct. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: I mean, I guess I would be interested in pursuing the idea of expanding the jurisdiction of the district court to handling, you know, on a potential when there is a time crunch, maybe the district court could get involved. But I don't know what you think about that. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: My opinion is that the district court's calendar is more full than the county court's, and I think that would be very difficult to do. Let me add a little bit to what the previous testifier testified to. You can get into all sorts of situations. I had a case not so long ago on a conservatorship, and we were actually...the conservator had been appointed in this situation, but maybe had been appointed too rapidly. So it might further the position of the bar association, but there were 13 nephews and nieces, one of the nieces had gone in and had been appointed. There was a lot of questions with regard to the actions taken by that niece. But just to try to schedule a hearing to terminate the conservatorship, which we finally got terminated, a number of these nephews and nieces wanted to come. And so you can get into scheduling problems just trying to provide a date that most of them could come back. Now, we weren't under these emergent situations, but we could have been and had the same situation. So you not only are looking at a trial date that the court sets, but when a number of people can get back and testify who may be pretty...they were all out of state, except for the one who had been appointed. But it is the kind of situation you could run into in even making a good decision on the part of the probate court as to who should be appointed. And so I would also say that in many, many instances the temporary conservatorship, conservator is perhaps the same person who's going to be the eventual conservator. That's not always true because if there's a big conflict, courts are more likely...more inclined to appoint a third party rather than one of the people who are contending to be the conservator. But I can certainly see the situation where it would be beneficial to be

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able to extend that beyond the 90-day period. And the law before had provided, as it now stands, had provided that the court may extend temporary conservatorship for successive 90-day periods. And that was actually changed in the 90 days so that the court would have authority to extend it for shorter periods than 90-day periods, so I thought that made the bill better. I think that was my suggestion that we don't have it limited to 90-day periods, that it could be an extra 10 days or an extra 30 days. But I still think the bill is probably good. Whether it needs some further limitations from what is proposed in this bill, I guess it will be up to this committee to sort out. But in closing, I do want to say that I believe that there is good reason for all of the bills, in particularly for sure the other three. This one may need some work. I don't think much work would be needed on the other three bills and whether you want to incorporate them into one bill or do them as three, four separate bills is a decision that this committee would need to make, I guess. So I thank you. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Thanks, John. Thanks for coming. Senator Rogert though has... [LB170 LB46 LB47 LB118]

SENATOR ROBERT: If this was asked, I apologize. I was gone for a little while. Is this more of a problem in rural counties than it is in like Lancaster and Douglas do you think? [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Well, you know it's difficult for me to say. I have been involved in the situation that I discussed just a minute ago, but that did not involve this particular section of the statute. It actually had to do with terminating a conservatorship, but I think the same problems could apply either outstate or instate. So it probably gets down to who has the bigger scheduling problems, and that probably is more of a problem in Lincoln and Omaha than it is outstate. But having said that, Lexington happens to be in my district or Kearney happen to be places where there would be a judge there almost on a daily basis. We have a number of Sandhills counties that there is a judge one day a month there, and if that doesn't fit the schedule and there's not much the court can do as far as subpoenaing people to come and testify when they all live out of state. So you kind of have this setback hearing... [LB170 LB46 LB47 LB118]

SENATOR ROBERT: Well, that's my question. If it's a scheduling problem because...well, I don't have a county where, they're all there one day a week at most. And so if they just don't have...and if it's one day a month, maybe we can, I don't know, limit it to something that has to with the calendar. But that's why I asked the question. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Right. Well, we happen to have a large share of the counties in the United States that have less than 1,000 people. Statistically, I think there's about 32 counties in the United States and about 6 of them are in my judicial district. [LB170 LB46 LB47 LB118]

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SENATOR ROBERT: Yeah. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: So we have a large percentage of the counties of the entire United States that probably have a judge one day a month. And I'm not sure it's really that often. I think the judge probably calls ahead, and if there is not enough to justify going there, but I think they go and they schedule all four counties on the same day, that he travels to four of those counties. And that probably doesn't leave much time for a contested hearing, so I think some flexibility is justified to take care of those counties and maybe the larger counties that may have more scheduling problems. [LB170 LB46 LB47 LB118]

SENATOR ROBERT: Okay. Thank you. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: Thanks, John. Thanks for agreeing to do all four...oops, Roger has something for you. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: Oh, wait. We would like to enter into the record. We should have probably done this before closing, but hopefully the committee will... [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: We probably will still accept it, John. [LB170 LB46 LB47 LB118]

SENATOR WIGHTMAN: (Exhibit 2) We have something from the Cattlemen, a letter, written in support of LB118. And I don't know, they may have had some on the others, but I'm not sure. Maybe this is the only one they have. But I will enter it into the record, if I might. [LB170 LB46 LB47 LB118]

SENATOR ASHFORD: (See also Exhibit 3 and 4) Thank you. That concludes the hearing on these four bills. We'll now go to Senator Lautenbaugh, LB352. Corners and boundaries don't seem exactly the same subject matter as civil procedure service, so you probably better do each one. (Laugh) [LB170 LB46 LB47 LB118 LB352]

SENATOR LAUTENBAUGH: Well, it may be deceptive, but they'll both be brief, so I don't think it matters that much. Mr. Chairman, members of the committee, my name is Scott Lautenbaugh. I introduced LB352 and LB353. The other day I was speaking to a member of the Trial Lawyers Association, and he said to me, well, not all of your bills are terrible. And so with that ringing endorsement thundering in my ears, I came to committee today. [LB352]

SENATOR ASHFORD: Well, we're really looking forward to LB352. [LB352]

SENATOR LAUTENBAUGH: I assume he meant these as the nonterrible ones on my

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roster this year. LB352 basically put allows instead of for just service by certified mail using U.S. Postal Service certified mail--I'll get the verbiage right here--it also allows for the use of a commercial courier service such as Fed Ex, to serve the documents as well. You're still obtaining the signature. It's just not being done necessarily by the U.S.P.S. It's being done by UPS or Fed Ex or whatever you choose. So it just simply expands the options available to someone seeking service of process. And I'd be happy to take any questions. Senator Council has some. [LB352]

SENATOR ASHFORD: Yes, Senator Council. [LB352]

SENATOR COUNCIL: Senator Lautenbaugh, when I read this I assumed that was your intent, but I'm going to tell you the language troubles me. And what we may be looking at is a...or "express mail service." The problem I have with courier service, we have a number of courier services that are just individual hand-delivery, a courier, an individual person delivering something. And that would present the exact problem that Judge McQuade alluded to during the testimony that, you know, particular collection agencies could select a particular courier service, and you would have no way of controlling whether or not. So I have no opposition. I assumed that's what you were talking about, like Fed Ex or UPS or DHL. But I think that the better term would be "express mail service" as opposed to...or "commercial mail service" as opposed to "courier" because courier, the standard definition of that is "individual who makes delivery," and I don't want you to run into any problems with that. [LB352]

SENATOR LAUTENBAUGH: Yeah. And I will tell you, probably not to your surprise, this idea didn't occur to me. I did not draft this bill. There's no pride of authorship, but I do know that's the intent and I'm happy to amend it so that it's clear that we're not talking about...we don't want some guy to open up a commercial courier service one day and say, okay, you know. [LB352]

SENATOR COUNCIL: I can serve these for you. Yeah. [LB352]

SENATOR LAUTENBAUGH: Yeah. I mean, there's got to be some definition of it. I would agree. [LB352]

SENATOR COUNCIL: Yes. And you might just consider "commercial express mail service." [LB352]

SENATOR LAUTENBAUGH: I don't even know if that 100 percent addresses your concern, but I'm sure there's got to be a way and I'm happy to work to come up with one. [LB352]

SENATOR ASHFORD: Great. [LB352]

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SENATOR LATHROP: I just want you to know I think it's a great idea. (Laughter)
[LB352]

SENATOR ASHFORD: Yeah. I love this bill [LB352]

SENATOR LATHROP: If you're trying to serve somebody and the Fed Ex man shows up at the house versus a guy that shows up looking like he's in the narcotics unit, he's going to come and sign for whatever you're delivering. So I think it's a sweepstakes.
[LB352]

SENATOR COUNCIL: They're more likely to sign for a Fed Ex package. (Laugh)
[LB352]

SENATOR ASHFORD: Sweepstakes winner, yeah. I think it's a good idea. [LB352]

SENATOR LATHROP: Anyway, thanks for bringing this, Senator, to talk about. [LB352]

SENATOR ASHFORD: I don't think it needs anymore testimony actually. [LB352]

SENATOR LAUTENBAUGH: That's what I was just saying. [LB352]

SENATOR ASHFORD: Unless...are there any opponents? I just don't want to taint your bill is what I was getting at. Really? Okay. [LB352]

SENATOR LAUTENBAUGH: Do I have to get up or are you just going to stand?
[LB352]

SENATOR LATHROP: Are you going to sit on his lap? (Laughter) Somebody needs to move. [LB352]

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association.
[LB352]

SENATOR ASHFORD: With some trepidation, you should say. [LB352]

BILL MUELLER: With some trepidation. I will tell you this idea came to the bar association from a Kearney lawyer. And when our committee looked at it, we thought that it was a good idea. We actually did research and two states allow this--Utah and North Carolina. And we started out with language something to the effect of Federal Express, UPS, DHL. In looking at one or both of these other states, they use the language "commercial courier service," but I will go back and look and see if there is a better definition of what we're talking about. Thank you. [LB352]

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SENATOR ASHFORD: Just on another matter, Bill. Do you...(laughter) [LB352]

SENATOR LATHROP: Yeah. Thanks for coming up on LB170. [LB352]

SENATOR ASHFORD: Yeah. Thanks for coming up on that. Just to relate back to some prior issues, do the district judges, would they have any objection to probate...the district court having concurrent jurisdiction with... [LB352]

BILL MUELLER: I have not taken that up with them, but I certainly will. [LB352]

SENATOR ASHFORD: Thanks. [LB352]

BILL MUELLER: And I would second with Senator Wightman saying I think that the district court docket is as busy if not busier than a county court docket. [LB352]

SENATOR ASHFORD: Okay. Thank you. [LB352]

BILL MUELLER: Thank you. [LB352]

SENATOR ASHFORD: Senator Lautenbaugh, LB...I'm sorry, any opponents? [LB352]

SENATOR LAUTENBAUGH: You already did those. (Laughter) [LB352]

SENATOR ASHFORD: That's right. LB353. [LB352 LB353]

SENATOR LAUTENBAUGH: LB353. This is why I said these might not be as disparate as you think because they are relatively procedural, but unrelated I guess. Again, my name is Scott Lautenbaugh. This one was brought to me as well a few years back, and I think my time scale is different from Senator Wightman's, but it was just a couple years back. I think we went from complaints to petitions...I'm sorry, from petitions to complaints. This is another statute where it still says petition, we're changing it to complaint. [LB353]

SENATOR ASHFORD: Sort of like the value of money. You know, the 1980 value and the 2009 value and the 1980 law. It's all kind of relative to age. You know, we all are in different places. [LB353]

SENATOR LAUTENBAUGH: Yes. (laughter) I don't know what to say to that. We did possibly have a friendly amendment in mind because there might be some places in the compact where it still says "petition" rather than "complaint." But that's not ready today, so and there might be others yet. [LB353]

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SENATOR ASHFORD: Yes, Senator Rogert. [LB353]

SENATOR LAUTENBAUGH: So yes, so don't move it today. [LB353]

SENATOR ROBERT: Senator Lautenbaugh, on line 4, page 2 can you address the new language? [LB353]

SENATOR LAUTENBAUGH: Which bill are you on? [LB353]

SENATOR ROBERT: The one you just introduced. [LB353]

SENATOR LAUTENBAUGH: LB353? [LB353]

SENATOR ROBERT: Yeah. Line 4, page 2 there's new language. [LB353]

SENATOR LAUTENBAUGH: Oh, I'm sorry. I thought... [LB353]

SENATOR COUNCIL: The dreaded comma. (Laughter) [LB353]

SENATOR ROBERT: Yeah. All right. Nevermind. I'm fine. He can't even find it. [LB353]

SENATOR LAUTENBAUGH: No, I can't explain that. [LB353]

SENATOR ROBERT: Okay. [LB353]

SENATOR LATHROP: Having your way with the Judiciary Committee today. [LB353]

SENATOR ASHFORD: Thank you, Scott. Any other questions? Any testifiers on this bill? Any opponents? Neutral? That concludes the hearing on LB353. [LB353]

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Disposition of Bills:

LB170 - Indefinitely postponed.

LB46 - Held in committee.

LB47 - Placed on General File with amendments.

LB118 - Held in committee.

LB352 - Held in committee.

LB353 - Held in committee.

Chairperson

Committee Clerk